Manor Care of Yeadon Pa, LLC d/b/a Manorcare Health Services-Yeadon *and* SEIU Healthcare Pennsylvania, Petitioner. Cases 04–RC–196504 and 04–RC–197201

July 25, 2019

ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The Employer's request for review[1] is granted solely with respect to whether the unit found appropriate in Case 04–RC–197201 is an appropriate unit for collective bargaining.[2] The case is remanded to the Regional Director for further appropriate action consistent with *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017),[3] and Memorandum OM 18-05, including reopening the record, if necessary. In all other respects, the request for review is denied as it raises no substantial issues warranting review.[4]

Dated, Washington, D.C., July 25, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

Contrary to the majority, I would not remand this case to the Regional Director to apply *PCC Structurals, Inc.,* 365 NLRB No. 160 (2017), after granting review on the appropriate-unit issue in Case 04–RC–197201.[1]

The majority asserts that *PCC Structurals* overruled *Specialty Healthcare*,[2] and "in doing so reinstated the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining bargaining units in nonacute care health facilities." Certainly, this is what the majority decision in *PCC Structurals* purported to

[1] The Employer seeks review of the Acting Regional Director's Decision and Direction of Election in Case 04–RC–196504, the Acting Regional Director's Decision and Direction of Election in Case 04–RC–197201, and the Regional Director's Decision and Certification of Representative covering both of the aforementioned cases.

[2] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[3] In *PCC Structurals*, the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and in doing so reinstated the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining bargaining units in nonacute healthcare facilities such as the Employer. See *PCC Structurals*, supra, slip op. at 1 and fn. 3. The Board there explained that it reinstated *Park Manor* for the reasons stated by former Member Hayes in his dissenting opinion in *Specialty Healthcare,* supra. We reject our colleague's charge that *PCC Structurals* wrongfully reinstated *Park Manor* without public notice and an invitation to file briefs, as the Board has frequently overruled or modified precedent without supplemental briefing. See, e.g., *PCC Structurals*, supra, slip op. at 11 (citing cases).

[4] In denying review of the Regional Director's decision not to remand Case 04–RC–196504 in light of the issuance of *PCC Structurals*, we agree with the Regional Director and the Acting Regional Director that the Employer abandoned its unit scope arguments. In doing so, we emphasize that (1) the Acting Regional Director found that the Employer failed to identify in its Statement of Position those classifications of employees that it sought to include in the petitioned-for unit and thus waived its right to argue that the only appropriate unit is one that includes additional classifications (see Secs. 102.63(b)(1)(i) and 102.66(d) of the Board's Rules and Regulations) and the Employer failed to challenge this finding; (2) the Employer made no effort to press the unit scope issue at the preelection hearing; (3) the Employer has clarified for the first time in its request for review that its desired unit is a wall-to-wall unit; and (4) the Employer has not offered even a cursory explanation for why the petitioned-for unit is inappropriate (or why the wall-to-wall unit is the only appropriate unit).

In agreeing with the Acting Regional Director's denial of the Employer's renewed motion to transfer both cases to another Region, the Acting Regional Director's denial of the Employer's arguments with respect to the hearing officer's rulings in Case 04–RC–196504 limiting the Employer's right to cross-examine witnesses on credibility issues, and the Regional Director's subsequent decision to overrule Objection 2 in Case 04–RC–197201, we find that the Employer's request for review is deficient as it does not comply with the requirement that such a request be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. We find the request for review to be similarly deficient with respect to the Employer's argument that the licensed practical nurses in Case 04–RC–196504 possess the authority to responsibly direct employees within the meaning of Sec. 2(11) of the Act. See Sec. 102.67(e) of the Board's Rules and Regulations.

In denying review of the Regional Director's overruling of Objections 2 (Case 04–RC–196504) and 4 (Case 04–RC–197201), we note that Sec. 11351.1 of the Board's Casehandling Manual (Part Two) (Representation Proceedings) and related case law such as *Builders Insulation, Inc*., 338 NLRB 793 (2003), are geared towards situations where the election was not conducted *at all* on the originally-scheduled date through no fault of a party, and not towards situations, as here, where the election date was merely postponed in order to comply with the Board's Notice-posting Rules.

Chairman Ring and Member Kaplan express no view with respect to whether they agree or disagree with revisions made to the Board's Election Rule, but they agree that it applies here and warrants denial of the Employer's request for review.

[1] In all other respects, I agree with the majority's decision.

[2] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

do—in a perfunctory footnote,[3] and without prior notice to the public, briefing, or an evidentiary record. But as Member Pearce and I pointed out in dissent, that step was improper.[4] *PCC Structurals* did not present the *Park Manor* issue. The case did not involve the specialized rules governing bargaining units in nonacute healthcare facilities, but rather a petitioned-for unit of welders in the aerospace industry, to which the *Park Manor* standard has never applied. Naturally, the parties in *PCC Structurals* did not address the *Park Manor* standard. As a result, not surprisingly, the majority in *PCC Structurals* provided no rationale for reinstating that standard, except to cross-reference former Member Hayes' dissenting opinion in *Specialty Healthcare*. So, the Board has not had occasion (until now) to fully engage with the reasons for or against possible reinstatement of *Park Manor* in a case that actually presents the question.

The Board should correct its error in *PCC Structurals* today. If the majority wishes to consider reinstating the *Park Manor* standard—which was overruled, for persuasive reasons, in *Specialty Healthcare*, supra, it should not only permit the parties here to file briefs on review addressing possible reinstatement, it should also issue a notice and invitation to file briefs, so that the public can weigh in. Failure to do so means that today's decision—based only on *PCC Structurals*—will also fail to conform to due-process standards.

Dated, Washington, D.C., July 25, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[3] 365 NLRB No. 160, slip op. at 1 fn. 3.

[4] Id., slip op. at 16 (dissenting opinion). As the dissent observed, "in resurrecting *Park Manor*, the majority has examined no relevant data, articulated no satisfactory explanation, and established no rational connection between the facts found in this adjudication and the choice to return to the [*Park Manor*] approach." Id., citing *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mutual Auto Insurance Co.*, 463 US. 29, 43 (1983).